SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1915.

No. 384. 76

The James Clark Distilling Company, Appellant,

vs.

The American Express Company and the State of West Virginia.

Appeal from the District Court of the United States for the District of Maryland.

BRIEF FOR APPELLANT ON RE-ARGUMENT.

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We submit that every question arising in this case prior to the amendment of the law of West Virginia by the Act of May 24, 1915, was substantially decided by the court in Adams Express Company vs. Commonwealth of Kentucky, 238 U. S. 190 (June 14, 1915); and that only the effect of that amendment requires additional consideration.

The bill (R. 7) sought to compel the carrier to transport for plaintiff, in interstate commerce, liquors ordered by plaintiff's customers in West Virginia for their personal use. The original decree of the court below (R. 40) granted that relief, but imposed upon

the carrier the obligation that it should in good faith and in so far as it was reasonably able to do so, ascertain from the shipper whether the liquors were intended for personal use of the consignee, or whether they were intended to be used by the consignee in violation of the law of West Virginia; and to exercise the same good faith and care respecting deliveries to consignees, and where it appeared that the shipments were not intended for personal use, that they should not be accepted or delivered as the case might be. The final decree (R. 44) vacated the original decree and dismissed the bill. We contend that the original decree was correct and should be reinstated.

II.

In Adams Express Co. vs. Kentucky, 238 U. S. 190, the Kentucky statute made it unlawful for the carrier to bring an interstate shipment of liquor into, or deliver the same in any county where the sale of liquors was prohibited; and further provided that the place of delivery of such liquors should be held to be the place of sale. The Adams Express Company violated this statute. It appeared that the consignee intended the liquor for his personal use and that such use of liquor was not a violation of the law of Kentucky. The court said, at p. 202:

> "It therefore follows that, inasmuch as the facts of this case show that the liquor was not to be used in violation of the laws of the State of Kentucky, as such laws are construed by the

highest courts of that State, the Webb-Kenyon Law has no application and no effect to change the general rule that the states may not regulate commerce wholly interstate."

Prior to the former argument of this case, on May 10, 1915, the law of West Virginia was in respect to the issues involved here not substantially different from the law of Kentucky. It provided in section 3 (original act of February 11, 1913) that "in case of a sale in which a shipment or delivery of such liquors is made by a common, or other carrier, the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, etc." And in section 7 as amended (Act of January 29, 1915) it provided "that no common carrier, for hire, nor other person, for hire or without hire, shall bring or carry into this state, or carry from one place to another within the state, intoxicating liquors for another, even when intended for personal use, etc." The right of the citizen to personally use liquors and have them in his possession for that purpose is expressly recognized in sections 7 and 31 of the statute as amended in 1915, and is not denied by any act of the legislature. That right as upheld in State vs. Gilman, 33 W. Va. 146, is as effectively established in West Virginia as it is in Kentucky by the decisions of the highest court of that state, to which this court referred in Adams Express Co. vs. Kentucky. It therefore follows that the construction of the Webb-Kenyon Law adopted by this court in the Kentucky case has only to

be applied in this case to laws of the state of West Virginia which are not substantially different from the laws of Kentucky.

III.

It remains to consider whether any new issue is imported into the case by the amendment to the law of West Virginia adopted at the extraordinary session of 1915, and incorporated into the statute as section 34. That section provides:

> "It shall be unlawful for any person in this state to receive, directly or indirectly, intoxicating liquors from a common, or other carrier. It shall also be unlawful for any person in this state to possess intoxicating liquors, received directly or indirectly from a common, or other carrier in this state. This section shall apply to such liquors intended for personal use, as well as otherwise, and to interstate, as well as intrastate, shipments or carriage. Any person violating this section shall be guilty of a misdemeanor and upon conviction shall be fined not less than one hundred dollars nor more than two hundred dollars, and in addition thereto may be imprisoned not more that three months; provided, however, that druggists may receive and possess pure grain alcohol, wine and such preparations as may be sold by druggists for the special purpose and in the manner as set forth in sections four and twenty-four." Passed May 24, 1915, effective August 22, 1915.

There is nothing in this section, nor in any other section of the statute, which makes it an offense for the

citizen to have in his possession for personal use and to use intoxicating liquors. In fact the right to have and use liquors where the citizen has personally secured them outside the state is expressly recognized by section 31 (c. 7, Acts of 1915), which provides that it shall be a misdemeanor—

> "for any person to bring or carry into the state, or from one place to another within the state, even when intended for personal use, liquors exceeding in the aggregate one-half of one gallon in quantity, unless there is plainly printed or written on the side or top of the suit case, trunk or other container, in large display letters, in the English language, the contents of the container or containers, and the quantity and kinds of liquor contained therein."

In State vs. Sixo, 87 S. E. 267, decided by the Supreme Court of Appeals of West Virginia, November 30, 1915, the court, construing this section in a case where defendant brought into Monongalia County, West Virginia, for his personal use, two quarts of whisky, two quarts of rum, and four pints of beer, said:

> "This statute does not prohibit a person from having in his possession liquors for personal use, when properly marked or labeled."

Referring to section 7, as amended by chapter 13 of the act of 1915, the court said:

> "Under this proviso, a person may lawfully have intoxicating liquors in his home for personal use, subject to the restrictions named."

And further, that—

> "Any one has the right to keep intoxicating liquors in his home for personal use, and, having the right to keep them, he must have the right to take them there, under reasonable regulation; and, if the state has reason to believe that such liquors are being kept as a shift, scheme, or device to evade the provisions of this act, the burden, in the first instance, is on the state, by some proper evidence, to show this."

The state law therefore recognizes the right of the citizen to use and have liquors, but undertakes, by section 34 (ante p. 4), to make it an offense for him to receive liquors which he has purchased in another state for such lawful use, from an interstate carrier, and to have in his possession liquors so received. It is not the use or possession of liquors which is forbidden, but their **transportation** in interstate commerce. A state law which prevents the sale of liquors within the state is a police measure. A state law which undertook to make the possession and use of liquors in the state illegal would also be a police measure, even though it might be invalid because in conflict with the Fourteenth Amendment. But a state law which makes it an offense to receive from a carrier in interstate commerce, liquors intended for lawful personal use, and at the same time permits the individual to purchase liquors, carry them to his home, keep them there for personal use and use them, is not a police measure; it it a direct regulation of commerce, not authorized by

the Webb-Kenyon Law or by the commerce clause of the Federal Constitution.

In Adams Express Company vs. Commonwealth of Kentucky, 238 U. S. 190, Mr. Justice Day, after stating the terms of the Webb-Kenyon Act, said, at p. 199:

> "It would be difficult to frame language more plainly indicating the purpose of Congress not to prohibit all interstate shipment or transportation of liquor into so called dry territory and to render the prohibition of the statute operative only where the liquor is to be dealt with in violation of the local law of the state into which it is thus shipped or transported. Such shipments are prohibited only when such person interested intends that they shall be possessed, sold or used in violation of any law of the state wherein they are received. Thus far and no farther has Congress seen fit to extend the prohibitions of the Act in relation to interstate shipments. Except as affected by the Wilson Act, which permits the state laws to operate upon liquors after termination of the transportation to the consignee, and the Webb-Kenyon Act, which prohibits the transportation of liquors into the State to be dealt with therein in violation of local law, the subject matter of such interstate shipment is left untouched and remains within the sole jurisdiction of Congress under the Federal Constitution."

IV.

It is contended by the State that plaintiff's shipments are contraband because, in part at least, they are made for the purpose of filling orders which were secured by advertising and solicitation, forbidden by section 8 of the Yost Law. State vs. Davis, —W. Va.—, 87 S. E. 262 (Supreme Court of Appeals of West Virginia, November 30, 1915), is relied on to support the contention. In sustaining a conviction in that case the court said:

> "If orders should be obtained by means of circulars, or other advertisements inhibited by the statute, and result in a sale and delivery of liquors within the state, such sale would be a violation of the statute, and be covered by the Webb-Kenyon statute. So we conclude, in view of the interpretation of the Wilson Act, that this latest federal statute supplementing that act has so far removed restrictions upon state action as to validate the provisions of the Yost Law in question, and that defendant is guilty as charged."

The conclusion of the court that such advertisements could result in a sale which would be a violation of the West Virginia law was based upon the provision of section 3 thereof undertaking to make the place of delivery the place of sale, where liquors are shipped over the lines of a common carrier, and it was accordingly held that such "a sale" was in violation of the statute "whether such liquors were intended for the personal use of the purchaser or not." But, as decided

in Adams Express Co. vs. Kentucky, the state of West Virginia has no power, in the case of interstate shipments for lawful, personal use, to make the place of delivery the place of sale.

Delamater vs. South Dakota, 205 U. S. 93, is not in point. We referred to that case in our original brief at page 29, and also to the case of Rose vs. State, 133 Ga. 353, which points out the distinction between the Delamater case, where the solicitation of orders was personally carried on by the agent of the non-resident liquor dealer within the state of South Dakota, and the present case where it is carried on through the mails.

The soliciting of orders for the sale of liquors to be shipped in interstate commerce is beyond question an incident of commerce. In the Delamater case it was held to be an incident which the states by the provisions of the Wilson Act had jurisdiction to control, where the soliciting was carried on as a business solely within the borders of the state. But it does not follow that under the Wilson Act the control over such an incident of commerce is within the jurisdiction of the state, when the business is carried on in two states. In that case it is a transaction which in its very nature requires to be governed by laws apart from the laws of the several states. Nor does the Webb-Kenyon Act confer upon the states any more extensive jurisdiction in this respect than they had under the Wilson Act, unless the shipments are brought within the terms of the Webb-Kenyon Act by showing that the "liquor is

to be dealt with in violation of the local law of the state into which it is shipped or transported." That is not this case. The liquors here involved are not to be "possessed, sold or used in violation of any law of the state wherein they are received," but in accordance with its constitution and laws as construed by the highest court of the State.

We respectfully submit that the decrees in this case and in No. 383 dismissing the bills should be reversed, and the cases remanded with directions to reinstate the original decree in each case.

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